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No. 965

In The Supreme Court of The United States

OCTOBER TERM, 1965

GEORGE KOHATSU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REHEARING

Pursuant to Rules 42 and 58 of the Revised Rules of the United States Supreme Court, the undersigned hereby moves this Court for leave to file the attached Amicus Curiae Brief in support of Petition for Rehearing in the above entitled action.

Said Motion is made on the ground that the attached Brief raises matters not previously argued by the parties which matters are believed to be relevant to the Court's determination of whether to grant rehearing in the above case. Counsel's interest is grounded in a deep concern for the Constitutional Rights of taxpayers

accused of crime and the conviction that the rights of such persons have not received adequate protection from the courts. Additionally, the undersigned is counsel for T. Kimball Hill in the case of Hill v. United States, 346 F. 2d 175 (9th Cir. 1965) cert. denied 382 U. S. 956 (1965), a matter which involves issues substantially similar to those in the above action.

/s/ JAMES O. HEWITT

Counsel on Amicus Curiae Brief

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Amicus Curiae Petition for Rehearing of Order Denying Petition for Writ of Certiorari

Amicus Curiae Counsel herein prays that this Court grant rehearing of its order of June 20, 1966, denying George Kohatsu's petition for writ of certiorari, 34 U.S. L. Week 3429, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled action as prayed for in the petition for certiorari filed in behalf of petitioner Kohatsu on January 28, 1966.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The holding of this Court in Miranda v. Arizona, 34 U.S. L. Week 4521 (June 13, 1966) makes it imperative that a decision be rendered on the constitutionality of the investigative procedures employed by the Internal Revenue Service in tax fraud cases.

In the previous petitions filed with this Court on behalf of Petitioner George Kohatsu, it was pointed out that a very real problem of great practical and constitutional importance today is that of effectuating the constitutional rights of taxpayers charged with criminal fraud. In a very real sense, the taxpayer has become the forgotten man of our system of criminal law. As was pointed out, the difficulty stems fundamentally from the fact that the typical tax fraud prosecution develops in a manner significantly different from that of other crimes. Consequently, the considerable body of law which has developed over the years and which is aimed at protecting the rights of the criminally accused, has been of little help to the taxpayer in fraud cases.

The crucial issue in this regard can be summarized in one sentence: What is an "intentional" and "knowing" waiver of rights within the meaning of Johnson v. Zerbst, 304 U.S. 458, 464 (1938) and Miranda v. Arizona, 34 U.S. L. Week 4521 (June 13, 1966)? Or, stated otherwise, can there be an "intentional relinquishment or abandonment of a known right or privilege," in a situation where the facts indicate that the accused had no actual knowledge of the existence of his rights, or of how to effectuate them? Such, it is submitted, was the precise situation confronting George Kohatsu and such,

it is suggested, is the case with the overwhelming proportion of criminally accused taxpayers.

In spite of the clear admonition of this Court in Johnson v. Zerbst that a constitutional guarantee is not waived unless there is "an intentional relinquishment or abandonment of a known right or privilege," lower courts have nonetheless insisted on finding supposed "waivers" on the part of taxpayers in numerous cases where knowledge of constitutional rights or of the consequences of their waiver was largely lacking. Such a view of the law, it is believed, is totally inconsistent with the holdings of this Court in Johnson v. Zerbst, Escobedo v. Illinois, 378 U.S. 478 (1964) and particularly Miranda v. Arizona, where the Court noted at page 4532 that:

> "This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304 U.S. 458 (1938), and we re-assert these standards as applied to in-custody interrogation."

The decision of this Court in Miranda has, it is submitted, proclaimed with finality that there can be no such thing as an "unknowing waiver" of constitutional rights. In Miranda this Court made imminently clear that when a person is interrogated in circumstances which may render his apparent cooperation something less than a free and knowledgeable act of the will, that good sense and good constitutional law require that he be first warned of his rights and be given an opportunity to intelligently exercise them.

The Miranda decision was, of course, geared to the

type of interrogation which is common to the overwhelming body of criminal prosecutions; i.e., the jail house interview in the course of which the accused, after being arrested by the police, is brought to the station house and subjected to various psychological pressures aimed at exhorting admissions from him.

The Miranda decision does not purport to deal with the somewhat different situation in which the criminally accused taxpayer finds himself. Unlike the ordinary criminal accused, the taxpayer charged with a crime is almost never arrested. He is seldom confronted by anyone whom he recognizes as a criminal agent and he rarely sees the inside of a jail -- at least not until after conviction. Yet, for all of this, the taxpayer accused of crime has as much compulsion to involuntarily cooperate with governmental authorities as does his brethren who are being interrogated in the police station.

In the case of the person being "grilled" at the station house, he is at an admittedly great disadvantage in that the police have him confined and are in a position to induce cooperation by various oppressive psychological techniques. But, one thing he does know for certain is that he is being interrogated by criminal investigators whose aim is to convict him of a crime. To this extent, at least, he knows the problems he faces and can take steps to resist the interrogation. The taxpayer, on the other hand, though generally not subjected to a jailhouse confinement, is in a very real sense at an even greater disadvantage due to his lack of awareness of the fact that he is under criminal investigation. The psychological pressures on such a person are immense for the very reason that lack of knowledge of the nature of the investigation deprives the taxpayer of the one great

incentive which motivates the ordinary accused, namely, the instinct of self-preservation which inclines every person to naturally resist those who accuse him of crime.

Stated differently, why should it be a more pardonable practice for a Special Agent of the Internal Revenue Service to obtain a taxpayer's cooperation by knowingly and intentionally keeping him uninformed of his rights and even uninformed as to the nature of the proceeding against him, than it is for a policeman to obtain the cooperation of the accused in the station house by keeping him uninformed of his rights in those circumstances. In both cases, the methods employed are equally an affront to the dignity of the person accused and in neither case is the cooperation "free" and "knowing" in the sense these terms are used in Miranda.

The Miranda decision unquestionably sets out a philosophy of law aimed at protecting the person accused of crime from inadvertently waiving his inviolate constitutional rights. As Miranda points out, no person should be convicted by evidence obtained from himself in an atmosphere which renders cooperation a bare mechanical act, devoid of meaning and substance. Yet, the cooperation of the taxpayer with a Special Agent of the Internal Revenue Service is just exactly that.

Because the average taxpayer is totally unaware of the distinction between a "general agent" and a "special agent" and usually is not even aware that there exists a criminal division of the Internal Revenue Service, the possibility of the taxpayer "knowingly" and "freely" waiving his constitutional rights in such circumstances is slim indeed. The fact that a plainly dressed individual

carries credentials identifying himself as a "Special Agent of the Intelligence Division of the Internal Revenue Service" is totally unenlightening to the taxpayer and of no help whatever in informing the accused of his rights, or even of the nature of the investigation. Yet, for all of this, courts have complacently gone on throughout the years, finding that the taxpayer has "knowingly" and "freely" waived his rights by cooperating with the Special Agent.

Such decisions, it is believed, are totally at odds with both the holding and the intent of Miranda and, therefore, it is of the utmost importance that the Court grant certiorari in the above case in order to resolve and clarify once and for all the constitutional status of those thousands of Americans who every year are investigated for violations of the criminal tax laws.

CONCLUSION

It is up to this Court to determine in the final analysis whether the taxpayer accused of crime is to continue as a second class citizen of our legal system or whether his constitutional rights will receive the same protections accorded the rights of others. Only by granting certiorari in a case such as this can the Court make this vitally important determination. It is respectfully submitted, therefore, that the Court reconsider its order denying certiorari and grant the rehearing petitioned for.

/s/ JAMES O. HEWITT
Counsel on Amicus Curiae
Petition

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of this Court.

/s/ JAMES O. HEWITT